

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

UNITED STATES COAST GUARD
Complainant

vs.

HAROLD LANGLEY

Respondent

Docket Number 2009-0397
Enforcement Activity No. 3590096

DECISION AND ORDER
Issued: March 02, 2010

By Administrative Law Judge: Honorable Michael J Devine

Appearances:

James T. Staton
Sector Hampton Roads

For the Coast Guard

PHILIP N. DAVEY, Esq. and
Philip Chisholm
For the Respondent

This written order is issued in accordance with 33 CFR 20.902(c), which authorizes the issuance of an initial decision from the bench (orally) followed by a written order. The United States Coast Guard initiated this administrative action seeking revocation of the Merchant Mariner's Document ("MMD") issued to Harold Langley, the respondent in this case. The Complaint dated September 9, 2009 alleges that Respondent is the holder of a Coast Guard issued MMD and that he violated 46 U.S.C. 7703(1)(B) and 46 CFR 5.27 while acting under the authority of said document. The Complaint specifically alleges that Respondent provided a

substitute sample in connection with a random drug screening conducted aboard the USNS REGULUS on June 29, 2009. The Complaint further states that Quest Diagnostics tested Respondent's specimen in accordance with Department of Transportation approved testing procedures and that the lab determined that Respondent's specimen was inconsistent with human urine. The Complaint further alleges that Respondent's specimen was analyzed and reconfirmed that it was "Substituted: Not Consistent With A Normal Human Urine" as determined by Dr. Anu Konakanchi, MD the Medical Review Officer. The Coast Guard alleges that "substituting a urine sample" is a refusal to test that constitutes misconduct and sought revocation of Respondent's MMD.

On September 21, 2009, Respondent filed an Answer wherein he admitted all jurisdictional allegations, denied the factual allegations, and requested a hearing in this matter. No specific defenses were provided therein. On September 29, 2009, Mr. Philip Chisholm filed a notice of appearance seeking to assist Respondent as a non-attorney representative in this matter. On February 23, 2010, Mr. Philip N. Davey, Esq. submitted a notice of appearance to the Coast Guard to serve as Respondent's attorney in this case. Service of this notice did not reach the undersigned ALJ until the day of the hearing. Mr. Davey is an attorney and represented Respondent in this matter along with Mr. Philip Chisholm.

An evidentiary hearing was held in Norfolk, Virginia on February 25, 2010 and February 26, 2010. The hearing was conducted in accordance with Administrative Procedure Act, amended and codified at 5 U.S.C. §§ 551-59, Coast Guard Administrative Procedure statute codified at 46 U.S.C. § 7702, and the procedural regulations codified at 33 CFR Part 20.

At the hearing, Mr. James Staton and Lt(jg) Dianna Bailey appeared for the Coast Guard. Respondent also appeared at the hearing represented by attorney Philip Davey along with his non-attorney representative Mr. Philip Chisholm. Respondent admitted to jurisdiction by

Answer but continued to contest the factual allegations in the Complaint throughout this proceeding.

The Coast Guard presented the sworn testimony of three witnesses and submitted three exhibits which were admitted¹ into evidence. Respondent presented the sworn testimony of three witnesses and presented six exhibits which were admitted into evidence. The witness and exhibit lists are contained in Attachment A.

At the conclusion of the hearing, both parties waived post-hearing briefs in keeping with 46 CFR 20.710 and a bench decision was issued orally finding the jurisdictional and factual allegations in this case proved by a preponderance of reliable, probative, and credible evidence. An order directing revocation of Respondent's MMD was issued. The findings of fact and conclusions of law may be summarized as follows:

FINDINGS OF FACT AND CONCLUSIONS OF LAW

1. Respondent Harold Langley and the subject matter of this proceeding are within the jurisdiction of the Coast Guard under the authority of 46 U.S.C. Chapter 77 and an individual participating in authorized drug test is acting under the authority of a merchant marine credential under 46 CFR 5.57.
2. At all relevant times, Respondent Harold Langley was the holder of the Merchant Mariner's Document 057127 at issue in this case.
3. On June 29, 2009, Respondent was working for Maersk Line as a crew member on board the USNS REGULUS and thus was acting under the authority of his MMD at all relevant times.

¹ After review during the hearing the portion of CG Exhibit 02 referring to an action regarding Respondent's credential in 1990 was found not relevant and not considered for any purpose in this matter.

4. Respondent is generally regarded by his coworkers as a skilled, reliable, and all around valued member of the crew on board the REGULUS.
5. At all relevant times, Maersk Line had a company policy which, among other things, provided for company ordered random drug testing of its employees serving on board the REGULUS and its sister ship the POLLUX. This company policy serves as a duly established rule for the purpose of determining misconduct.
6. On June 29, 2009, there was a company ordered random urinalysis conducted on all Maersk Line employees serving on board the REGULUS and its sister ship the POLLUX in keeping with the Maersk Line company policy. The collection occurred on board the REGULUS in accordance with the Department of Transportation Drug testing Regulations.
7. On June 29, 2009, Respondent submitted to the company ordered random urinalysis and provided a sample purported to be his urine specimen to the collector on board the REGULUS.
8. After the collection, Respondent's specimen number 6122863 was documented as collected and forwarded to Quest Diagnostics for analysis. Respondent's sample was processed and tested in substantial accordance with Department of Transportation drug testing requirements appearing in the regulations at 49 CFR Part 40.
9. While collecting specimens on the REGULUS on June 29, 2009, the collector complied with requirements for identifying individuals providing specimens and the requirements for dating and initialing the seal for specimens and requirements for completing the chain of custody form were followed.

10. A normal human urine specimen has a creatinine level between 27 and 260 and a specific gravity between 1.0020 and 1.0028 and water has a creatinine level of zero and a specific gravity of 1.0000.
11. Quest Diagnostics' test results indicated that Respondent's specimen number 6122863 had no detectible creatinine and a specific gravity of 1.0000 which is consistent with water.
12. Dr. Anu Konakanchi, MD was the Medical Review Officer in this case and reviewed the documentation relating to Respondent's sample. On or about July 15, 2009, the MRO contacted Respondent to question him about the test results for his specimen and determined that there was no valid medical reason for the results indicating Respondent's sample was inconsistent with human urine and determined to be a substituted sample.
13. There was evidence presented regarding a clerical error wherein the Medical Review Office initially thought Respondent's urinalysis results belonged to Mr. Philip McKenna. The mistake arose from the MRO office staff misreading the specimen control number from a fax sent to the Medical Review office causing Mr. McKenna to have two test results attributed to him and no test results attributed to Respondent. Mr. McKenna's specimen was number 6122868. Respondent's specimen number was 6122863. Respondent Exhibit B. Testimony at the hearing indicated that the quality of the facsimile of Respondent's specimen documentation received by the MRO Office was not good and had been incorrectly read as 6122868 instead of 6122863.

14. Because of the clerical error, the MRO initially contacted Mr. McKenna instead of Respondent about the substituted sample results.
15. Witness Paula Gough, a Maersk Line employee subsequently noticed the clerical error and as a result, the correct number (6122863) showing test results for Respondent was provided to the Medical Review Officer. The second fax was legible and the MRO then contacted Respondent about the substituted sample (specimen 6122863).
16. The Medical Review office at some later point contacted Mr. McKenna to apologize for the mistake and indicated that the error had been corrected and that the correct person had been contacted regarding the substituted sample.
17. This clerical error was minor and did not compromise the chain of custody or integrity of Respondent's specimen for testing at the lab. I find that the clerical error in the MRO Office and other evidence that questioned whether faucets were taped in the toilet or whether blue dye was used does not present sufficient evidence to affect the demonstrated chain of custody and testing of specimen 6122863 which was identified as Respondent's specimen. Technical infractions that do not breach the chain of custody or violate a specimen's integrity do not compromise the testing procedure. Appeal Decision 2625 (Robertson) (2002).
18. Evidence that the specimen provided by Respondent on June 29, 2009 was a substituted specimen was an aggravating factor in determining Respondent's sanction in that its deceptive nature undermines the purpose of drug testing and safety at sea.

19. In keeping with the rulings in this case Respondent's record showed no prior incidents or violations. Any evidence relating to 1990 was rejected as not relevant and was not considered for any purpose.
20. The Coast Guard has proven by a preponderance of reliable, probative, and credible evidence that the Respondent committed misconduct by failing to follow a duly established rule while acting under the authority of his Coast Guard issued MMD. Specifically, the Coast Guard proved that Respondent provided a substituted urine specimen to collectors for a company ordered random urinalysis conducted on June 29, 2009 and that Respondent's sample was collected and processed in accordance with the DOT drug testing regulations.
21. Providing a substituted specimen constitutes a refusal to test and a refusal to test is misconduct under the regulations, therefore I find that the Charge of Misconduct is proven.
22. Official notice is taken of Appeal Decision 2578 (Callahan) (1996) and of Commandant v. Moore, NTSB Order No. EM-201 (2005).

SANCTION

Prior to issuing the bench decision, I carefully reviewed the record and considered all of the evidence presented in this matter beginning with the Complaint and Answer and note that the proposed sanction of revocation would exceed the suggested range of sanctions contained in Table 5.569 of 46 CFR 5.569. The single violation of misconduct for refusing a drug test indicates a range of sanctions from 12 to 24 months outright suspension. In this case, Respondent provided a substituted sample to collectors in connection with a company ordered random drug screening. There was no evidence of Respondent having any other violations or

incidents and there was considerable evidence that Respondent is a valued member of crew on board the REGULUS and is a well respected and reliable coworker. This evidence was considered in Respondent's favor and served as mitigating evidence.

On the other hand, the deceptive nature of providing a substituted sample in connection with a company ordered random drug test undermines the purpose of a drug tests and undercuts safety at sea. As such, this was regarded as a significant aggravating factor in determining Respondent's sanction of revocation.

The Table of Average Orders is only intended to provide information and guidance, and the Administrative Law Judge is not bound by the range of appropriate orders in 46 CFR 5.569(d). Appeal Decision 2578 (CALLAHAN) (1996); Appeal Decision 2475 (BOURDO) (1988). Evidence of mitigating or aggravating circumstances may justify departing from the suggested range. 46 CFR 5.569(d).

The Coast Guard recommends a sanction of revocation arguing that the substituted sample is a deceptive act and should be met with the most severe penalty allowed.

In opposition Respondent presented argument that he is a well respected and reliable coworker with no history of prior offenses or incidents. Applicable authority indicates that evidence in aggravation should be presented to support going beyond the suggested range of sanctions in the table. Commandant v. Moore, NTSB Order No. EM-201 (2005).

After considering all of the evidence in the record including the fact that a mariner provided a substitute sample in connection with a company ordered random drug test, I find that the aggravating evidence in this case is substantial and outweighs the mitigating evidence by a significant degree. Substitution of a specimen is an intentional act and constitutes a refusal to test. Such interference with the integrity of the testing process creates a risk of an impaired mariner continuing to serve in a safety sensitive position. The drug-testing regulations are designed to minimize use of intoxicants by merchant mariners and to promote a drug free and

safe work environment. This goal would be undermined if merchant mariners could either substitute a specimen or refuse to participate in a chemical test and receive a lesser sanction than if they tested positive for a controlled substance. Appeal Decision 2578 (Callahan) (1996); Appeal Decision 2625 (Robertson) (2002). The purpose of the regulations for suspension and revocation proceedings is remedial and intended to maintain standards for competence and conduct essential to the promotion of safety at sea. 46 CFR 5.5. Based on the evidence of record as a whole, I find that the Coast Guard has provided sufficient evidence of aggravating factors to support exceeding the suggested range contained in the table. Therefore, I find that revocation is the appropriate sanction in this case.

WHEREFORE,

ORDER

IT IS HEREBY ORDERED THAT the Merchant Mariner's Document and all other Coast Guard licenses, certificates and documents issued to Respondent Harold Langley are **REVOKED**. Respondent's Merchant Mariner Document has been surrendered to the U.S. Coast Guard Sector Hampton Roads Office, 200 Granby Street, Norfolk, Virginia 23510 and shall be processed appropriately. Respondent must immediately surrender any other Coast Guard issued credentials to the Coast Guard, Sector Hampton Roads, 200 Granby Street, Suite 700, Norfolk, VA 23510. If you knowingly continue to use your documents, you may be subject to criminal prosecution.

PLEASE TAKE FURTHER NOTICE that Service of this Order on the parties and/or parties representatives serves as notice of appeal rights as set forth in 33 C.F.R. § 20.1001 -1003. (Attachment B). If requested during the time period for submitting an appeal, a copy of the transcript of the hearing will be provided at no cost to Respondent. The time period to file a notice of appeal is 30 days or less after issuance of the decision. 33 CFR 20.1001.

Done and dated March 2, 2010
Baltimore, Maryland

Michael J Devine
US Coast Guard Administrative Law Judge

Date: March 02, 2010

ATTACHMENT A
WITNESS AND EXHIBIT LIST

Coast Guard Witnesses

Paula Gough, Human Resources Manager, Maersk Line

Mike Kneis, Specimen Collector, Anderson Kelly Associates

Dr. Anu Konakanchi, Medical Review Officer, University Services

Respondent Witnesses

Mr. Philip Chisholm, Chief Engineer

Captain Fitzhugh Dixon, Captain

Philip McKenna, mariner contacted by mistake

Coast Guard Exhibits

- 1 Documents related to Specimen 6122863
- 2 MMD Details for Respondent
- 3 Laboratory Litigation Package.

Respondent Exhibits

- A. Federal Drug Testing Control Form
- B. University Services MRO Report
- C. Reference Letter, Sea Star Lines
- D. Reference Letter, George Eldemire
- E. Reference Letter, Mark Sorochnykyj, Acting Chief Engineer, REGULUS
- F. Reference Letter and comments on clerical error from Rick Burkhardt