UNITED STATES OF AMERICA
DEPARTMENT OF HOMELAND SECURITY
UNITED STATES COAST GUARD

UNITED STATES OF AMERICA UNITED STATES COAST GUARD	:	DECISION OF THE
v.	:	VICE COMMANDANT
	:	ON APPEAL
MERCHANT MARINER LICENSE	:	NO. 2702
Issued to: SHEAN MASON CARROLL	:	

APPEARANCES

For the Government:
CWO Christian Menefee, USCG
LT Christopher L. Jones, USCG
Coast Guard Sector Houston/Galveston
Mr. Gary F. Ball
Suspension and Revocation National Center of Expertise

For Respondent:
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Kenneth B. Fenelon, Jr., Esq.
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Administrative Law Judge: Dean C. Metry

This appeal is taken in accordance with 46 U.S.C. § 7701 *et seq.*, 46 C.F.R. Part 5, and the procedures in 33 C.F.R. Part 20.

By a Decision and Order (hereinafter "D&O") dated January 20, 2012, an Administrative Law Judge (hereinafter "ALJ") of the United States Coast Guard suspended the Merchant Mariner License of Mr. Shean Mason Carroll (hereinafter "Respondent") for twenty-four months upon finding proved two charges of misconduct in violation of 46 U.S.C. § 7703(1)(b) and 46 C.F.R.

§ 5.27, by refusing a drug test. The specifications found proved alleged that on February 5, 2010, Respondent refused a drug test, following a determination that the temperature of his urine sample was outside the acceptable range, by failing to raise and lower his clothing to permit the observer to determine that he did not have a prosthetic device, and by possessing or wearing a prosthetic device that could be used to interfere with the sample collection process. The Coast Guard appeals.

FACTS

At all relevant times, Respondent was the holder of a Merchant Mariner License issued to him by the United States Coast Guard. [D&O at 3; Transcript (hereinafter "Tr.") at 677] On February 5, 2010, Respondent was ordered by his employer to take a random drug test. [D&O at 3; Tr. at 38-41] Respondent's initial urine sample was determined to be out of the acceptable temperature range. [D&O at 4; Tr. at 139, 141-43, 162-63, 183; Coast Guard Exhibit (hereinafter "CG Ex.") 6] During a subsequent attempt to collect a urine sample under direct observation, Respondent refused instructions from the collector to raise his shirt and lower his clothing to permit the collector to determine if Respondent possessed a prosthetic device. [D&O at 4; Tr. at 239-40; CG Ex. 1 and 16] The collector observed a clear plastic tube protruding from Respondent's underwear. [D&O at 4; Tr. at 240, 246-48; CG Ex. 1 and 16] Respondent's employer determined that his actions constituted a refusal to test. [D&O at 5; Tr. at 355, 384, 402, and 441]

BASES OF APPEAL

This Coast Guard appeal is taken from the ALJ's D&O suspending Respondent's Merchant Mariner License, rather than revoking it. The Coast Guard asserts the following bases of appeal:

I. The ALJ abused his discretion and issued a decision not in accordance with the law and Commandant precedent, when he failed to revoke the credential of a mariner who fraudulently refused a Coast Guard-required drug test; and

II. The ALJ's decision to not revoke the credential of a mariner who attempted to defraud the Coast Guard drug-testing program does not promote safety at sea and violates public policy.

OPINION

Appeal Decision 2692 (CHRISTIAN) stated:

The standard of review for abuse of discretion is highly deferential:

> A reviewing court conducting review for abuse of discretion is not free to substitute its judgment for that of the trial court, and a discretionary act or ruling under review is presumptively correct, the burden being on the party seeking reversal to demonstrate an abuse of discretion . . . [A]buse of discretion occurs where a ruling is based on an error of law, or, where based on factual conclusions, is without evidentiary support.

Appeal Decision 2610 (BENNETT) (quoting 5 Am. Jur. 2d Appellate Review § 695 (1997)).

Given this standard of review and the fact that the Coast Guard's appeal does not allege that the ALJ's factual conclusions were without evidentiary support, the inquiry on appeal becomes whether the presiding ALJ committed an error of law in granting Respondent's motion to dismiss.

Appeal Decision 2692 (CHRISTIAN) at 3-4.

In this case, the issue is not whether there was an error of law in granting a motion to dismiss, but whether the ALJ committed an error of law in ordering suspension of the Respondent's Merchant Mariner License instead of ordering revocation. The Coast Guard has not challenged the ALJ's factual conclusions.

I.

The ALJ abused his discretion and issued a decision not in accordance with the law and Commandant precedent, when he failed to revoke the credential of a mariner who fraudulently refused a Coast Guard-required drug test.

The Coast Guard argues that despite the ruling by the National Transportation Safety Board (hereinafter "NTSB") in *Commandant v. Moore*, NTSB Order No. EM-201 (2005), the ALJ was bound, in accordance with 46 C.F.R. § 5.65, to follow Commandant's Decision on Appeal caselaw precedents that approved the revocation of Merchant Mariner credentials in cases where refusal to test was proved and an aggravating factor was found.

In *Moore*, the NTSB declined to uphold an ALJ's upward departure from the guidance set forth in the table in 46 C.F.R. § 5.569 "without a clearly articulated explanation of aggravating factors." NTSB Order No. EM-201 at 14-16. In that case, the ALJ had ordered revocation of the merchant mariner's credential after finding proved a charge of misconduct for refusal to test. *Id.* at 1-2. However, neither the ALJ, nor the Vice Commandant in affirming the ALJ's order, identified any aggravating factors to support an upward departure from the guidance in 46 C.F.R. § 5.569. *Id.* at 15. The NTSB observed that the Commandant's Decision on Appeal in *Moore* included a statement that "essentially constitutes a policy of automatically supporting revocation in every case when a mariner has refused to submit to a random drug test." *Id.* The Board held that such a policy was in conflict with the guidance in 46 C.F.R. § 5.569, which indicates that an appropriate sanction for refusal to test is a 12-24 month suspension. *Id.* at 15-16. Because no aggravating factors had been identified to justify an upward departure from the regulatory guidance, the Board modified the revocation to a 24-month suspension. *Id.* at 16. The Board noted that the Coast Guard could change its regulation to make revocation mandatory if a refusal-to-test charge is proved. *Id.* The regulation has not been changed.

The Coast Guard asserts that the NTSB decision in *Moore* only affects refusal-to-test cases where there are no aggravating factors, but that in cases where there are aggravating factors the ALJ is required to follow a policy of automatic revocation found in Commandant's Decisions on Appeal (hereinafter "CDOAs") decided before and after the NTSB decision in *Moore*. [CG Appeal Brief at 2-5] The Coast Guard's argument is not persuasive for two reasons: First, past CDOAs, while supporting orders of revocation in refusal-to-test cases, have never gone so far as to state a policy requiring ALJs to order revocation if a refusal-to-test case involves certain or any aggravating factors; and, second, 46 C.F.R. § 5.65, the regulation giving binding effect to principles and policies enunciated in CDOAs, does not give the Coast Guard authority to use CDOAs as a vehicle to make policies that conflict with or modify existing regulations.

Concerning past CDOAs upholding revocation in refusal-to-test cases, Appeal Decision 2652 (MOORE) held only that the ALJ did not err, "under the facts of this case, in revoking Respondent's mariner credential." *Moore* at 14. Moore and the other refusal-to-test cases cited by

the Coast Guard, both before and after the NTSB's *Moore* decision, all affirm that the standard to be applied is whether the ALJ's order is clearly excessive or an abuse of discretion. Appeal Decisions 2578 (CALLAHAN) and 2624 (DOWNS) held that the ALJ's order of revocation was not excessive or an abuse of discretion. *Callahan* at 11; *Downs* at 18. Appeal Decisions 2690 (THOMAS) and 2694 (LANGLEY) held that the ALJ's order of revocation, given the evidence in aggravation, was not excessive or an abuse of discretion. *Thomas* at 11; *Langley* at 6. To argue that these holdings establish binding precedent requiring revocation in all refusal-to-test cases that include aggravation is completely unpersuasive.

It is true that in most of these five cases, the decision on appeal explicitly supported the appropriateness of revocation as a sanction for refusal to test, and even endorsed revocation as the sanction most likely to effectuate the purposes of the drug testing requirements and prevent merchant mariners from using dangerous drugs. Those statements came in cases appealing an ALJ's order of revocation. The Coast Guard has not cited a decision on appeal in which an ALJ's order assessing a sanction less than revocation for refusal to test has been determined to be unlawful or arbitrary and capricious.[1]

It is fair to say that CDOAs have encouraged revocation in refusal-to-test cases, but that is a far cry from establishing a principle or policy binding ALJs.

The regulation making principles and policies announced in CDOAs binding on ALJs, 46 C.F.R. § 5.65, is consistent with a well-recognized principle of administrative law: that an agency's interpretation of its own regulations is controlling unless it conflicts with the plain meaning of the regulations. *Auer v. Robbins*, 519 U.S. 452, 461 (1997). The limitation warrants emphasis: an agency cannot interpret regulations in a manner that is inconsistent with their plain meaning. This limitation must also apply to 46 C.F.R. § 5.65. That appears to be the basis for the NTSB's decision in *Moore*, discussed earlier. The NTSB concluded that any policy in prior CDOAs calling for automatic revocation was not controlling because it conflicted with 46 C.F.R. § 5.569, which suggested a range of suspension sanctions for refusal to test and authorized an

[1] It is not obvious how such a determination could come about, given the standard of review applied to the discretionary decision on sanction.

upward departure only if there were aggravating circumstances. NTSB Order No. EM-201.

The Coast Guard, in its brief, appears to have embraced the comment in the NTSB's *Moore* decision that posits "a policy of automatically supporting revocation . . . ." The Coast Guard thus argues that this is a "policy" within the meaning of 46 C.F.R. § 5.65, which binds an ALJ except to the extent that the NTSB has modified the policy. This argument gives the NTSB's use of the term "policy" unwarranted significance, leading to misapplication of 46 C.F.R. § 5.65. While CDOAs have supported orders of revocation in refusal-to-test cases, any such support cannot create a mandate for revocation in refusal-to-test cases, because such a mandate would conflict with the unambiguous meaning of regulations in 46 C.F.R. Part 5 that give ALJs broad discretion in fashioning sanctions, *see* 46 C.F.R. §§ 5.567(a) and 5.569(a), except when an exception is specifically provided, as in 46 C.F.R. § 5.59. The unambiguous meaning of a regulation always controls over any conflicting language in a CDOA, 46 C.F.R. § 5.65 notwithstanding. The only way to add to the offenses for which revocation is mandatory is to change the statutes or regulations governing Suspension and Revocation.[2]

On the issue at hand, although an ALJ may find it appropriate to order revocation in a refusal-to-test case and is authorized to do so, subject to *Commandant v. Moore*, NTSB Order No. EM-201, and indeed may be strongly encouraged, through statements in CDOAs, to order revocation in such a case, those statements in CDOAs are not "principles and policies" and do not require an ALJ to order revocation in such a case.

The ALJ did not abuse his discretion by failing to order revocation, because his order was within the range suggested by 46 C.F.R. § 5.569 and there is nothing in past CDOAs that would render the ALJ's order unlawful.

The Coast Guard's first basis of appeal is rejected.

[2] If this statement appears to conflict with principles expressed in Appeal Decisions 2205 (ROBLES) and 2613 (SLACK), resolution of the conflict must await an appropriate case.

II.

The ALJ's decision to not revoke the credential of a mariner who attempted to defraud the Coast Guard drug-testing program does not promote safety at sea and violates public policy.

In its second basis for appeal, the Coast Guard asserts that the ALJ's decision not to revoke Respondent's Merchant Mariner License violates public policy. Even if that were so, the Coast Guard has not cited any authority that would justify disturbing the ALJ's order on that basis.

The grounds for an appeal from the order of an ALJ are prescribed in 46 C.F.R. § 5.701. Public policy is only mentioned in § 5.701(b), which states that an appeal may be based on whether "each conclusion of law accords with applicable law, precedent, and public policy." However, the Coast Guard is challenging the ALJ's decision to order suspension rather than revocation. That decision is not a conclusion of law. It is a discretionary decision resulting from "the fair and impartial adjudication of each case on its individual facts and merits." 46 C.F.R. § 5.569(d). Accordingly, this argument does not present proper grounds to appeal the ALJ's order.

The Coast Guard requests that the ALJ's order be modified to an order revoking Respondent's Merchant Mariner License. [CG Appeal Brief at 13] That is certainly not within my authority. 46 C.F.R. § 5.805(b). I could remand the case to the ALJ for further proceedings, but the Coast Guard does not assert, and the record does not show, that the ALJ did not consider the factors, including public policy, that were relevant to a fair and impartial adjudication of the case on its individual facts and merits. The ALJ's D&O clearly shows that he considered that the proceeding should "'promote, foster, and maintain the safety of life and property at sea.'" [D&O at 25] He also considered the Investigating Officer's argument that revocation is an available sanction and that CDOAs have affirmed the principle that a refusal-to-test warrants an order of revocation. [D&O at 26]. The ALJ rejected the argument that an order of revocation was mandatory. [D&O at 26] In addressing the Coast Guard's first basis for appeal, I have also rejected that argument. In short, there is no reason to remand this case.

For these reasons, the Coast Guard's second basis of appeal is rejected.

CONCLUSION

The ALJ did not abuse his discretion in his decision to order suspension, and there is no other reason to disturb the ALJ's Order.

ORDER

The ALJ's Decision and Order dated January 20, 2012 is AFFIRMED.

J.P. CURRIER
Vice Admiral, U.S. Coast Guard

Signed at Washington, D.C., this 10 day of OCTOBER, 2013.